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7

8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,	)	Criminal Case No. 08CR0546-BEN
	)	
11 Plaintiff,	)	Date: September 16, 2008
	)	Time: 9:00 a.m.
12 v.	)	
	)	
13 JESUS ORTIZ (1),	)	<b>GOVERNMENT'S TRIAL</b>
ARTURO MORENO (2)	)	<b>MEMORANDUM</b>
	)	
14 Defendants.	)	
	)	
15	)	
16	)	

17 COMES NOW the plaintiff, the UNITED STATES OF AMERICA, by and through its  
18 counsel, Karen P. Hewitt, United States Attorney, and Randy K. Jones, Assistant United States  
19 Attorney, and hereby files its Trial Memorandum in the above-captioned case. Said memorandum is  
20 based upon the files and records of this case.  
21

22 **I**

23 **STATEMENT OF CASE**

24 **A. Indictment**

25 On February 27, 2008, a federal grand jury returned a four-count Indictment charging  
26 Defendants Jesus Ortiz ("Ortiz") and Arturo Moreno ("Moreno"), with bringing in illegal aliens for  
27 financial gain and aiding and abetting, in violation of 8 U.S.C. § 1324(a)(2)(B)(ii) and 18 U.S.C. § 2  
28

(Counts One and Three); and bringing in illegal aliens without presentation and aiding and abetting, in violation of 8 U.S.C. § 1324(a)(2)(B)(iii) (Counts Two and Four).

On February 28, 2008, the defendants were arraigned on the Indictment and entered pleas of not guilty.

On April 21, 2008, Ortiz filed his pre-trial motions for discovery and to for leave to file further motions. On May 22, 2008, Moreno filed his pre-trial motions for discovery; to suppress impermissibly suggestive identification; to dismiss the indictment due to misinstruction of the grand jury; to suppress evidence under the Fourth Amendment; and for leave to file further motions.

On June 30, 2008, the Government filed its response and opposition to defendants' motions, along with its motion for reciprocal discovery.

On August 18, 2008, the Court denied the defendants' motions and granted the Government's motion for reciprocal discovery.

**B. Trial Status**

Trial is scheduled for Tuesday, September 16, 2008 at 9:00 a.m., before the Honorable Roger T. Benitez. The United States expects that its case-in-chief will last one day.

**C. Status of Counsel**

Defendant Ortiz is represented by appointed counsel, Knut S. Johnson. Defendant Moreno is represented by appointed counsel, Stephen D. Demik, Federal Defenders, Inc.

**D. Custody Status**

The defendants are currently in custody.

**E. Interpreter**

The United States will need a court certified Spanish language interpreter for its material witness. The defendants will also need a Spanish interpreter.

**F. Jury Waiver**

The defendants have not waived their right to a trial by jury.

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### G. Motions in Limine

On September 8, 2008, Moreno filed his motions in limine to: exclude hearsay statements about supposed financial arrangements; exclude 404(b) and/or 609 evidence; exclude any expert testimony; prevent copy of the indictment from being submitted during deliberations; allow attorney conducted voir dire; disclose grand jury transcripts; provide separate copy of the jury instructions for each juror during deliberations; prohibit impermissible vouching; preclude evidence of any post-arrest silence; sever defendants; and for leave to file further motions.

On September 11, 2008, the United States filed its response and opposition to Moreno's motions in limine.

## H. Stipulations

There have been no stipulations filed at this time.

## I. Discovery

The United States has complied and will continue to comply with its discovery obligations. The defendants have not provided any reciprocal discovery.

## II

## STATEMENT OF FACTS

### A. Incident

On Wednesday, February 13, 2008, at approximately 9:00 p.m., Ortiz entered the United States at the Calexico, California East Port of Entry as the driver, sole occupant, and registered owner of a red 1999 Chrysler Sebring convertible. During primary inspection, Ortiz stated he was a United States citizen and presented a California driver's license as identification. Ortiz told United States Customs and Border Protection Service Officer (CBPO) Maria Salazar that he was not bringing anything into the United States. Ortiz' name was queried in the TECS record system and came back negative. Ortiz told Officer Salazar that he had been in Mexico visiting his grandmother. Officer Salazar noticed the car had only crossed one time before. Ortiz stated that he had owned the car for five years. Officer Salazar asked Ortiz if he crossed the border in the car frequently, and Ortiz said that he did. Based on this information, Officer Salazar referred Ortiz and the car to secondary inspection.

1 After Officer Salazar placed the referral slip on the windshield of the car, she told Ortiz to  
2 drive to the secondary lot. Officer Salazar asked Ortiz if he knew where the lot was. Ortiz said, "yes,  
3 straight ahead." Officer Salazar watched as Ortiz drove toward the secondary lot. As Ortiz got closer  
4 to the entrance of the secondary lot, he quickly veered the car northbound and "ran the port." Officer  
5 Salazar tried to contact someone in the secondary lot to stop the car but was unable to reach anyone  
6 in time.

7 The Calexico Police Department was called to assist in locating the car. A description of the  
8 Ortiz' car was transmitted over police radio. About 15 minutes later, Calexico Police Officer Mario  
9 Alcazar saw the car near Ortiz' residence. Ortiz was the driver and Moreno was the passenger. There  
10 were two other passengers riding in the back seat of the car. Ortiz parked the car in his driveway. All  
11 four occupants were removed from the car and taken back to the port of entry. Further investigation  
12 revealed that the two passengers were undocumented aliens from Mexico who had been smuggled into  
13 the United States in the vehicle.

14 Ortiz was later identified by Officer Salazar as the driver of the car that fled the port of entry.

15 **B. Criminal and Immigration History**

16 A subsequent records check revealed that Ortiz did not have a prior criminal or immigration  
17 record. The records check revealed that Moreno has a prior 2003 arrest for alien smuggling at the  
18 Calexico, California Port of Entry, but prosecution was denied. Moreno also has several DUI  
19 convictions.

20 **C. Post Miranda Statements**

21 On February 14, 2008, at approximately 4:14 a.m., Ortiz was placed under arrest and advised  
22 of his Miranda rights by CBPO Leticia Casillas. Ortiz stated he understood his rights and agreed to  
23 answer questions without an attorney being present. Ortiz gave the following statement:

24 He went to Mexicali, Mexico, to a restaurant, to make a reservation and claimed he was  
25 traveling alone. When he arrived at the port of entry, the primary officer questioned him and  
26 referred him to secondary. On his way to secondary, he decided to bypass secondary. Since  
27 no one told him to stop and he figured that if the officers really wanted him to go to secondary  
28 they would have stopped him or called him back. He drove to Moreno's home in Calexico and  
called Moreno on the phone to come outside. They drove to a McDonald's restaurant in  
Calexico. Upon arrival the restaurant, they were approached by two individuals who asked  
for a ride to Heber, California. He and Moreno agreed to give them a ride. Instead of going

1 into the restaurant, they drove the individuals to Ortiz' home to pick up his car and drop off  
2 his sister's car. Upon arrival at his home, they were arrested by the Calexico Police at  
gunpoint.

3 At approximately 5:45 a.m., Officer Casillas placed Moreno under arrest and advised him of  
4 his Miranda rights. Moreno stated he understood his rights and invoked.

5 **D. Material Witnesses' Statements**

6 Material Witness Erik Esquivel-Prado ("Esquivel"), in a videotaped interview, stated among  
7 other things that:

8 He was a citizen and native of Mexico with no legal entry documents to enter, reside or pass  
9 thru the United States. He arrived in Mexicali on February 12, 2008, at the Mexicali airport  
10 with two other friends, a female named, Veronica and his brother in law. Upon arriving to  
11 Mexicali, they took a cab to a shopping enter somewhere in Mexicali to a store named "Ley"  
12 to wait for a person whom his brother in law had arranged to help them gain entry into the U.S.  
13 A green four door vehicle showed up with two females. He and his two companions got in the  
14 vehicle with the two females, and they drove to an unknown street where the car pulled over  
15 and everyone exited the car except for the female driver. From there they traveled by bus to  
16 a Wal-Mart then to downtown Mexicali. A female named Bertha then took them to her house  
17 where she put out a mattress for them to sleep on. The next day, they woke up, had breakfast  
18 and in the afternoon Bertha took them back down town til about 9:00 pm, when another car  
19 showed up with a male driver. They were then told to go with the male driver who drove them  
20 to a liquor store. The male then exited the vehicle and went to talk to another male who was  
21 in a red convertible. When the man came back to the car, he told him that they were going  
22 to get in another vehicle. They left that location, traveled though various streets and came to  
23 a street that was not very well lit. They were instructed to get out of the car and the driver of  
24 the red convertible opened the trunk and the driver of the other car told him and the female to  
25 get in the trunk. His brother in law stayed behind. He was told by the males to stay quiet. The  
26 car then began to move and all he could hear was the radio playing. The radio was then  
27 lowered and he heard a voice asking questions which appeared to be in the English language.  
28 The car began to move again but this time the car went fast. It felt like the car went out of  
control. He was scared and his legs began to feel numb and he started to bang on the trunk and  
yelled "get us out" and the car would go fast, then stop, then drive fast again. The car stopped  
and it sounded like someone either got in or out of the car. He yelled again and he heard two  
voices say "calm down we are going to get you out". The car then stopped in what appeared  
to be a cul-de-sac and they were let out of the trunk. There was now another male who he had  
not seen when he first got in trunk. They were put in the back seat of the vehicle. It was about  
fifteen minutes from the time he started to bang on the trunk to the time he was let out of the  
trunk. Once in the back seat of the vehicle, the two males offered them water. He asked if  
they were already in the U.S. and both males answered "yes", then a police car drove by and  
the passenger told the driver to keep driving. The police car turned around and pulled up  
behind them and shined the lights on the car. He was told by the driver and passenger to say  
that they picked them up at McDonald's and asked them for a ride. The police instructed all  
of them in the car to get out one by one and then the Border Patrol came and brought them to  
the port. He was going to pay between \$3000 and \$4000 to be smuggled into the U.S. and that  
once in Calexico, he was going to be turned over to another female and then taken to Los  
Angeles, California and then to Sacramento, California, where he was to live with friends.

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1 Esquivel was presented with two photo line-ups, #1 and #2. On photo line-up #1, Esquivel  
2 corrected identified photo #1, defendant Moreno as the passenger. On photo line-up #2, Esquivel  
3 correctly identified photo #4, defendant Ortiz as the driver and the person who placed him in the trunk  
4 of the car in Mexico prior to their arrival at the port of entry. Esquivel identified Moreno as being  
5 present when he was removed from the trunk of the car. Esquivel stated that both Ortiz and Moreno  
6 instructed he and the other material witness to tell the officers that they were picked up at the  
7 McDonald's restaurant and that they had asked for a ride to Heber, California.

8 Material Witness Veronica Perez-Castilleja ("Perez"), in a videotaped interview, stated among  
9 other things that:

10 She was a citizen and native of Mexico with no legal entry documents to enter, reside or pass  
11 thru the United States. She arrived to Mexicali by plane from Mexico with two friends, Erik  
12 and Edgar, her boyfriend. From the airport she took a cab to a shopping center to wait for a  
13 female who was going to help them gain entry into the U.S.. Edgar made the arrangements  
14 with the female and later two females showed up and took them downtown with one of the  
15 females, named Bertha. Later that night they went to Bertha's house to sleep. The next day  
16 they went back to the shopping center and Bertha made calls and a male arrived. They went  
17 in his car, Edgar stayed behind. They left Bertha and went with the male who then took them  
18 to a liquor store. The male got out of the car and went to talk to a guy in a red convertible.  
19 They left there and went to another street and parked. The male told her to get out of the car  
20 and go to the car with the guy in the red convertible. The guy said "Hi" and he opened the  
21 trunk. She got in and then she got out so that her friend Erik could get in and then she went  
22 back in the trunk. Both males were there when they were placed in the trunk. Both men  
23 closed the trunk. The first male said don't move or make any noise. The car began to move  
24 and all she could hear was the radio and then she heard a women's voice and stated that she  
25 figured they were at the port of entry to the U.S. The car advanced fast and she felt a hard hit  
26 like a speed bump. She said her legs felt numb. Erik hit the trunk and said "open it". Later  
27 the car stopped. The car door closed again the began to move. A while later, the car stopped  
28 again and they opened the trunk and now there were two guys. The driver, the one she saw  
in Mexicali, told her to get out and asked if they were okay. The passenger told them that they  
were already in the U.S. They asked them if they wanted water. They got in the back seat of  
the car and the car started moving. Later they saw a police car coming towards them and pass  
them. The guy pulled into a house and said the police are coming back. He told them to say  
that they picked us up at Mc Donald's and that we don't know them. She asked them what she  
should say if the police asked where they were going. The driver said to tell them they were  
going to Heber. The police stopped them and told them to get out first. She asked the  
passenger where do I say she was going again, and he said Heber. They were all instructed  
to get out of the car one by one. The officers dressed in green brought them to the port/ She  
said they were going to pay between \$3000 and \$4000 USD to be smuggled into the U.S.

25 Perez was presented with two photo line-ups, #1 and #2. On photo line-up #1, Perez correctly  
26 identified photo #5, defendant Ortiz, as the driver, and on photo line-up #2, Perez correctly identified  
27 photo #3, defendant Moreno, as the passenger. Perez identified Ortiz as the person who placed him  
28 in the trunk of the car in Mexico prior to their arrival at the port of entry. Perez identified Moreno as

1 being present when she was removed from the trunk of the car. Perez stated that Ortiz and Moreno  
2 told her and Esquivel that the police were coming and instructed them to tell the officers that they  
3 were picked up at the McDonald's restaurant and that they had asked for a ride to Heber, California.

### 4 III

#### 5 PERTINENT LAW

##### 6 A. BRINGING IN ILLEGAL ALIENS FOR FINANCIAL GAIN

7 The essential elements of a violation of Title 8, United States Code, Section 1324(a)(2)(B)(ii)  
8 are that:

- 9 1. defendant knowingly and intentionally brought a person to the United States;
- 10 2. the person was an alien who had not received prior official authorization to come to,  
11 enter or reside in the United States;
- 12 3. defendant knew or acted in reckless disregard of the fact that the person was an alien  
13 who had not received prior official authorization to come to, enter, or reside in the  
14 United States;
- 15 4. defendant brought the alien to the United States for the purpose of commercial  
16 advantage or private financial gain; and
- 17 5. defendant acted with the intention of violating the immigration laws of the United  
18 States.

##### 19 B. BRINGING IN ILLEGAL ALIENS WITHOUT PRESENTATION

20 The essential elements of a violation of Title 8, United States Code, Section 1324(a)(2)(B)(iii)  
21 are that:

- 22 1. defendant knowingly and intentionally brought a person to the United States;
- 23 2. the person was an alien who had not received prior official authorization to come to,  
24 enter or reside in the United States;
- 25 3. defendant knew or acted in reckless disregard of the fact that the person was an alien  
26 who had not received prior official authorization to come to, enter, or reside in the  
27 United States;
- 28 4. that upon arrival in the United States or at the port of entry, defendant did not  
immediately bring and present the alien to an appropriate immigration officer at a  
designated port of entry; and
5. defendant acted with the intention of violating the immigration laws of the United  
States.

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C. AIDING AND ABETTING BRINGING IN AN ILLEGAL ALIEN FOR FINANCIAL GAIN

The essential elements of a violation of Title 18, United States Code, Section 2 are that:

1. someone brought an illegal alien to the United States;
2. defendant knowingly and intentionally aided, counseled, commanded, induced or procured that person to commit the bringing in or transportation of aliens;
3. the offense was committed for the purpose of someone receiving financial gain; and
4. defendant acted before the crime was completed.

IV

ANTICIPATED LEGAL ISSUE

A. THE COURT SHOULD ALLOW ARGUMENT THAT THE DEFENDANTS NEED NOT ACT FOR THEIR OWN PERSONAL GAIN

The plain language of Section 1324(a)(2)(B)(ii) requires only that the offense be done for the purpose of commercial advantage or private financial gain—not that the defendant himself acted for that reason. See 8 U.S.C. § 1324(a)(2)(B)(ii) (describing “an offense done for the purpose of commercial advantage or private financial gain”). The “offense done” is bringing aliens to the United States or attempting to bring aliens to the United States as defined in Section 1324(a)(2). Accordingly, the United States need not prove that Defendant himself acted “for the purpose of commercial advantage of private financial gain.”

In United States v. Angwin, 271 F.3d 786, 805 (9th Cir. 2001), the Ninth Circuit found that: The statute [8 U.S.C. § 1324(a)(2)(B)(ii)] does not require evidence of an actual payment or even an agreement to pay. It merely requires that the offense was done for the purpose of financial gain. Given [the smuggled alien’s] testimony that he expected that he would have to pay for his transportation once he arrived in Los Angeles, the substantial evidence of the defendant’s guilt, and the lack of any other possible explanation for Angwin’s conduct, the evidence was more than sufficient for a rational jury to conclude beyond a reasonable doubt that Angwin committed the offense for the purpose of private financial gain.

In United States v. Tsai, 282 F.3d 690, 697 (9th Cir. 2001), the Ninth Circuit stated that “[b]ecause [the defendant] was charged as an aider and abettor under 18 U.S.C. § 2, the government could make out this [financial gain] element merely by proving that a principal -- not necessarily [the defendant] himself -- committed the crime with a pecuniary motive; it need not show ‘actual payment or even an agreement to pay.’”



1 In its most recent decision on this issue, the Ninth Circuit reaffirmed its holding in Tsai that  
 2 a conviction under § 1324(a)(2)(B)(ii) may be “based on intent [to] financially [] benefit someone  
 3 other than the defendant” where the United States proceeds under a theory of aiding and abetting.  
 4 United States v. Munoz, 2005 WL 1405702, \*2 (9th Cir. 2005) (the Ninth Circuit held “that, in order  
 5 to impose § 1324(a)(2)(B)(ii)’s enhanced penalties on a defendant prosecuted as a principal, the  
 6 government must prove that she intended to derive a financial gain from the transaction”).

7 As the cases above demonstrate, when the United States proceeds on a theory of aiding and  
 8 abetting, 8 U.S.C. § 1324(a)(2)(B)(ii) requires that the United States prove only that somebody  
 9 brought an alien to the United States for the purpose of commercial advantage or financial gain -- not  
 10 that a defendant acted for his or her own *personal* profit. Thus, in the instant case, when proceeding  
 11 under a theory of aiding and abetting, the United States is not required to prove that either Defendant  
 12 was a principal in the illegal alien smuggling and transportation scheme, or that either Defendant  
 13 committed these offenses with a personal pecuniary motive. As such, the United States respectfully  
 14 requests that the Court permit this argument to the jury.

## V

### WITNESS LIST

17 The Government may call the following witnesses in its case in chief, but reserves the right  
 18 to call fewer or more witnesses, as necessary:

- 19 1. United States Customs and Border Patrol Officer Maria Salazar
- 20 2. United States Customs and Border Patrol Agent Leticia Casillas
- 21 3. Calexico Police Department Officer Mario Alcazar
- 22 4. Erik Esquivel-Prado (material witness)
- 23 5. Veronica Perez-Castilleja (material witness)

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VI

**EXHIBIT LIST**

The United States will provide an exhibit list on the morning of trial. Presently, the United States intends to offer into evidence the following physical evidence:

1. Photograph of car
2. Referral slip
3. Photo lineup #1
4. Photo Lineup #2
5. Area map

The United States will provide the defendants with a copy of all exhibits in discovery. The United States will make its exhibits available to defendants for examination in advance of trial. The United States requests an opportunity to examine defendants' exhibits before trial.

VII

**PROPOSED VOIR DIRE**

The United States requests that the following voir dire questions be addressed to the jury panel in addition to the Court's standard jury questions:

1. Is anyone had an unpleasant experience with any law enforcement personnel?
2. Has anyone had any disputes with any agency of the United States Government?
3. Does anyone have strong feelings about the Border Patrol, or the INS, the Immigration and Naturalization Service?
4. Does anyone believe that immigration laws are too harsh?
5. Does anyone believe anyone who wants to should be allowed to come enter the United States without any restrictions?
6. Does anyone believe that it should not be illegal to help a person without legal documents or authorization to enter the United States without authorization?
7. Does everyone understand that it is your duty is to apply the law regardless of whether you disagree with it?

- 1           8.     Does anyone here know the difference between direct and circumstantial evidence?  
2                 Direct means that a fact was observed. Circumstantial means that a fact may be  
3                 inferred.  
4           9.     Does everyone understand that as a juror you are not to consider prejudice, pity or  
5                 sympathy in deciding whether the Defendant is guilty or not guilty?  
6           10.    Does anyone have any strong religious or moral beliefs that would make it difficult for  
7                 you to pass judgment on another person and decide whether that person is guilty of the  
8                 charges if the evidence shows the person is guilty?  
9           11.    Does everybody understand that both the defendant and the Government are entitled  
10                to a fair trial?  
11           12.    The law requires the government to prove its case against the defendant beyond a  
12                reasonable doubt. If you are selected, would you want the government to prove its  
13                case by a higher standard of proof, say beyond any possible doubt?

14           The United States respectfully reserves the right to submit additional questions prior to trial.

15                                 **VIII**

16                                 **JURY INSTRUCTIONS**

17           The United States will file its proposed jury instructions under separate cover.

18   Dated: September 11, 2008

19                                 Respectfully submitted,

20                                 KAREN P. HEWITT  
21                                 United States Attorney

22                                 S/ Randy K. Jones

23                                 RANDY K. JONES  
24                                 Assistant U.S. Attorney

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ) Case No. 08CR0546-BEN  
Plaintiff, )  
v. )  
JESUS ORTIZ (1), )  
ARTURO MORENO (2), )  
Defendants. )

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, RANDY K. JONES, am a citizen of the United States and am at least eighteen years of age.  
My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of United States' Response and Opposition to Defendants' Motions to Compel Discovery, Suppress Impermissibly Suggestive Identification, Suppress Evidence, Dismiss the Indictment and for Leave to File Further Motions Together with Statement of Facts and Memorandum of Points and Authorities on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Knut S. Johnson E-mail: [Knut@knutjohnson.com](mailto:Knut@knutjohnson.com)  
2. Stephen D. Demik E-mail: [Stephen\\_demik@fd.org](mailto:Stephen_demik@fd.org)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 11, 2008

s/ Randy K. Jones  
RANDY K. JONES